telegraph company's negligent failure to deliver telegrams sent to a person in another state. *Held*, that the statute is constitutional. *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 31 Sup. Ct. 59.

Against the validity of this exercise of the state's police power through a statute founded upon the policy of the state to hold telegraph companies to the high standard of care that is desirable in callings quasi-public in nature, it was chiefly urged that the statute interfered with interstate commerce. The court, however, held that no direct restraint ensued and sustained the enactment under the language of a previous case, finding that it may be "fully carried out . . . without in any manner affecting the conduct of the company with regard to the performance of its duties in other states." *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 660. For a discussion of the principles involved, see 22 HARV. L. REV. 437.

JUDGMENTS — EQUITABLE RELIEF — ENFORCEMENT OF JUDGMENT FOR ADVANCE PAYMENTS ON CONTRACT OF SALE REPUDIATED BY BUYER. — In a contract for the sale of hops, A was to deliver in October, 1906, and B was to make part payments in the preceding April, May, and September, and on delivery. In March, B repudiated the contract. In May, A brought an action for $4000, comprising the first two payments, and final judgment was rendered in his favor in December, 1907. A did not tender delivery of the hops, which, in October, 1906, had a market value in excess of the contract price, but subsequently sold them at a loss. B now asks to have the enforcement of the judgment enjoined. The decree of the trial court refusing the injunction was affirmed by necessity, the court being evenly divided. *Livesley* v. *Krebs Hop Co.*, 112 Pac. 1 (Or.).

Since the market price at the time for delivery was higher than the contract price, if A had sued for a breach of the entire contract, he could have recovered only nominal damages (for the year 1906). *Tufts* v. *Bennett*, 163 Mass. 398; *Jones* v. *Jennings*, 168 Pa. St. 493. In the action for the advance payments, B might have urged that this was A's proper remedy, since B had repudiated the entire contract besides refusing to make the payments in question. *Acme Food Co.* v. *Older*, 64 W. Va. 255. See WILLISTON'S WALD'S POLLOCK, CONTRACTS, 362. But this point, not being taken, was waived. *Krebs Hop Co.* v. *Livesley*, 51 Or. 527. If B had made the advance payments, and A had wrongfully failed to deliver, B could have recovered what he paid. *Cherry Valley Iron Works* v. *Florence Iron River Co.*, 64 Fed. 569. See WILLISTON, SALES, § 600. Similarly if, after recovering judgment for advance payments, A had wrongfully failed to deliver, it is submitted that the enforcement of the judgment should have been enjoined. But the seller is excused from tendering delivery, if, when it is due, the buyer repudiates the contract or refuses to make overdue payments. *Cort* v. *Ambergate, etc. Ry. Co.*, 17 Q. B. 127. Since the litigation was in progress during October, 1906, A was excused from tendering delivery. The result of the principal case, therefore, seems sound in refusing to disturb the judgment.

LEGACIES AND DEVISES — CLASSES OF LEGACIES AND DEVISES — CONDITIONS IN RESTRAINT OF MARRIAGE: WHEN VOID. — A testatrix, having several daughters and one incompetent son, left the son's share to trustees for him for life, and after his death to her "unmarried daughters." Assuming that the beneficiaries were to be determined, not at the death of the testatrix, but at the death of the son, it was contended that the word "unmarried" ought to be stricken out as an illegal condition. *Held*, that the condition was not illegal. *Robinson* v. *Martin*, 200 N. Y. 159.

The Roman law held no donee bound by conditions tending to restrain his marriage. The ecclesiastical courts grafted this principle upon the law of

England. Proving unreasonably narrow, it was undermined by numberless subtle distinctions, until the law was thrown into such confusion that "a court would not appear to act too boldly whichever side of the proposition they adopted." *Stackpole* v. *Beaumont*, 3 Ves. Jr. 89, 98. One will not, therefore, quarrel with the result of the principal case, but the result seems better than the reasoning; *i. e.* that any condition is to be held valid unless there was actual intent on the part of the testator to discourage marriage, even though its obvious effect will be to do so. Some authority supports this doctrine. *Jones* v. *Jones*, 1 Q. B. D. 279; *Scott* v. *Tyler*, 2 Dick. 712, 722; *Mann* v. *Jackson*, 84 Me. 400; *Harlow* v. *Bailey*, 189 Mass. 208, 212. But the silent authority of the mass of decisions is against it. See cases collected in the dissenting opinion of CULLEN, C. J. On principle it seems that no sensible rule can be laid down but this: that each case should be considered with regard to all the circumstances, and decided on its own inherent reasonableness. See 2 REDFIELD, WILLS, 3 ed. 291, note. The state is interested in the prevention of race suicide and immorality, not the punishment of whimsical testators. *Commonwealth* v. *Stauffer*, 10 Pa. St. 350, 353. See 2 JARMAN, WILLS, 5 Am. ed., 573. Only when as a practical matter the condition will be a material check upon marriage should it be stricken out.

MORTGAGES — PRIORITIES — FLOATING SECURITIES: DEBENTURES. — Where an English corporation had charged all its property "whatsoever and wheresoever, both present and future" with a floating mortgage in the form of a debenture, payable on demand, the debenture holder, by claiming a prior lien, sought to prevent a judgment creditor from garnishing one of the mortgagor's assets. *Held*, that as the debenture was still floating and had not as yet attached to any specific asset the judgment creditor was entitled to have his garnishment order made absolute. *Evans* v. *Rival Granite Quarries*, [1910] 2 K. B. 974. See NOTES, p. 389.

NEGLIGENCE — DEFENSES — INJURY SUSTAINED IN SAVING PROPERTY ENDANGERED BY ANOTHER'S NEGLIGENCE. — Employees of the defendant company negligently removed a service cock from a city water main, permitting the water to be forced into an open window of apartments of which the plaintiff was caretaker. While she was attempting to close the window the plaintiff's clothes became soaked with water, and illness resulted. The court drew an inference of fact that there was no chance of closing the window without getting wet. *Held*, that the plaintiff is not entitled to recover. *Taylor* v. *Home Telephone Co.*, 128 N. W. 728 (Mich.).

The decision represents the view adopted by the Michigan courts, and a few other jurisdictions. *Cook* v. *Johnston*, 58 Mich. 437; *Pike* v. *Grand Trunk Ry. Co.*, 39 Fed. 255. See 16 HARV. L. REV. 379. The general rule, however, seems to be that it is not contributory negligence *per se* for one with reasonable prudence to expose himself to danger, for the purpose of saving his own or another's property from injury. *Liming* v. *Illinois Central R. Co.*, 81 Ia. 246; *Wasmer* v. *Delaware, Lackawanna, & Western R. Co.*, 80 N. Y. 212. The courts adopt this rule more readily in cases of saving human life. *Eckert* v. *Long Island R. Co.*, 43 N. Y. 502; *Henry* v. *Cleveland, C., C. & St. L. Ry. Co.*, 67 Fed. 426. And the plaintiff who has acted instinctively has usually been allowed to recover. *Cf. Coulter* v. *American Merchants' Union Express Co.*, 56 N. Y. 585. In the principal case the plaintiff deliberately walked into the water, and the court, applying the maxim *volenti non fit injuria*, holds that this alone is enough to bar a recovery. It seems that the right to recover should depend upon the reasonableness of the plaintiff's act, though she became wet deliberately in closing the window. *Cf. McKenna* v. *Baessler*, 53 N. W. 103 (Ia.); *Owen* v. *Cook*, 81 N. W. 285 (N. D.). But see 13 HARV. L. REV. 599. The decisions